**United States Department of Labor**

# Board of Alien Labor Certification Appeals

**Washington, D.C.**

Date: December 8, 1997

**Case No: 96 INA 354**

In the Matter of:

**GALE TATTERSALL,**
Employer,

On Behalf of:

**ADRIANA AVILA,**
Alien

Appearance: F. E. Ronzio, Esq., of Los Angeles, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

## DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ADRIANA AVILA (Alien) by GALE TATTERSALL (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the employer's responsibility to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

## STATEMENT OF THE CASE

On February 2, 1994, the Employer applied for certification to permit him to employ the Alien on a permanent basis as a "Cook Domestic Service" to perform the following duties in his household:

> The occupant of this position will be required to cook, season and prepare a variety of fish, chicken, meat dishes including soups, salads, sauces according to my instructions or drawing on the occupant's own recipes. Will also be required to plan menus and order foodstuffs. The occupant of this position will be required to serve meals and then after the meals are over, will clean up the kitchen and cooking utensils. Will service and cook for both lunch and dinner for two adults and 2 children in additions to various guests. In this respect, will be required to determine how many will be at each meal each day in order to properly plan the menu.
>
> Occupant will do the shopping by taxi or bus, or we will drive the occupant to the market. Cost of transportation will be paid for by this employer. Occupant will not be required to use own transportation or do any driving.
>
> Will also not be responsible for any housekeeping duties since these will be performed by a housekeeping agency.

AF 77-78. The work week was forty hours from 9:00 AM to 7:00 PM, at the rate of $12.17 per hour, with time and a half for overtime of fourteen hours per week. Employer contemplates a work week from Monday though Saturday, proposing to pay at the rate of time and a half on Saturday and for all hours over forty.

The position was classified as "Cook (Domestic Service) under DOT Code No. 305.281-010.[2] The application (ETA 750A) indicated no educational requirement, but required applicants to have had two years of experience in the Job Offered. AF 17.[3] After the job was advertised, sixteen U. S. workers applied for the position, none of whom was hired. AF 82-175.

**Notice of Findings**. On August 23, 1995, the CO's Notice of Findings (NOF) advised that certification would be denied unless the Employer corrected the defects noted. AF 69-74.[4] The CO cited 20 CFR § 656.3 and said the Employer's application failed to establish that the position at issue clearly was permanent full time employment under this regulation after considering the application and the evidence of record.

First, the CO observed that work of the cook in this household did not appear to require forty hours of regular time and five more hours of overtime to perform. In addition, the evidence did not appear to indicate that the Employer could afford to pay $28,602.60 a year in wages, as he currently has no domestic cook and it is not clear that the Employer is able to pay the offered wage.[5] The CO then specified the evidence that the Employer was to file as proof that this position is permanent and full time under the Act and regulations.

The CO then said that two of the U. S. applicants appeared to be both qualified and available, but had not been hired for this job, citing 20 CFR § 656.24(b)(2)(ii). The Employer was required to establish that he rejected these applicants was for

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[2]DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

[3]The Alien's application represented that she worked from January 1985 to October 1988 as a "Cook, Domestic Service" in a private home in Brazil, where she performed duties that were comparable to those stated in Employer's application. AF 62.

[4]The CO cited § 291 of the Act (8 U.S.C. § 1361), which provides that, "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document or is not subject to any exclusion under any provision of this Act."

[5]The CO cited 20 CFR §§ 656.20(c)(1) and (4).

reasons that were lawful and job-related, directing him to contact and interview each of them.

**Rebuttal**. On October 25, 1995, the Employer filed a rebuttal responding to the CO's NOF findings. Although Employer disputed the CO's authority to find that the job was not full time, he supplied answers to the CO's questions, but did not respond to the inquiry as to whether or not he could pay the wages offered. In addition, the Employer responded to the inquiries as to the contact with the U. S. applicants.

**Final Determination**. On December 7, 1995, the CO issued a Final Determination in which certification was denied on grounds that the Employer failed to prove that the position at issue constituted full time employment. The CO summarized the NOF and Employer's rebuttal, and explained that the rebuttal was not sufficient and that it had only provided a very small portion of the information the CO had requested about the job opportunity. Notwithstanding the arguments in the Employer's rebuttal, the CO cited **Ramsinh K. Asher**, 93 INA 347 (Nov. 8, 1994), to answer the citations of 1986 decisions that Employer offered to dispute the authority to request added information. As the Employer failed to produce the relevant and readily obtainable information as the NOF directed, the CO concluded that he failed to establish that a bona fide, full time position for a domestic cook existed, and the CO denied alien labor certification for this reason.

**Employer's appeal**. On December 28, 1995, the Employer filed a request for review of the denial of certification, which the CO treated as a request for reconsideration and denied on February 12, 1996. AF 24-35. The Employer filed a "Request for Further Consideration With Supplemental Filing" on February, 15, 1996, with which he enclosed a copy of an income tax return to demonstrate that he had the income to pay the annual wage of a full time Domestic Cook. With this the Employer resubmitted the Request for Review of Denial of Labor Certification" that he originally had filed on December 28, 1995. The CO denied this as a second Request for Reconsideration on February 23, 1996, and transmitted the file for review by BALCA.

## DISCUSSION

Under 20 CFR § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. Based on this regulation, it is found that the CO's request for specific information regarding the Employer's job opening was reasonable and the CO may require proof that a position for household cooks is confined to cooking on a full time basis. **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995). The Employer declined to present evidence to establish the facts necessary to prove that

he is offering a position of permanent, full time employment, as stated in the NOF.

As the Employer bears the burden of proving that a position is permanent and full time, certification may be denied, if the Employer's own evidence is not sufficient. Employer's Rebuttal evidence must rebut all of the NOF findings, and all findings not rebutted are deemed admitted for the purposes of this case. 20 CFR § 656(3). The Rebuttal and other remarks by the Employer's attorney do not constitute evidence unless they are supported by underlying statements by a person with knowledge of the facts or by the other documentation of record. **Mr. and Mrs. Elias Ruiz**, 90 INA 425 (Dec. 9, 1991); **Dr. Sayedur Rahman,** 88 INA 112 (Mar. 20, 1990). In this case, even if credible and even if the Employer had answered all of the CO's questions, it is not persuasive that he concurred in his lawyer's assertions at AF 46 as Employer's case cannot be proven by his own unsupported assertions. **Lamplighter Travel Tours,** 90 INA 038 (Nov. 28, 1990). Consequently, the undocumented statements in the Employer's brief are not sufficient prove his entitlement to certification. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). Moreover, it is clear on the face of the record that the Employer failed to provide all of the evidence directed in the NOF until after he had filed his Rebuttal and the Final Determination had been issued. For this reason his proffer of the tax return is untimely and its contents cannot be considered in this appeal. **Capriccio's Restaurant**, 90 INA 480(Jan. 7, 1992).

In the absence of supporting persuasive evidence the CO found that the Employer had failed to sustain his burden of proof to establish the full time nature of this position. The matter was determined by the CO on the basis of the absence of evidence that the CO reasonably requested in answer to questions that were germane to a grant of Certification for the reasons that the CO explained in the NOF. It follows that the CO's conclusion was supported by the evidence of record and should be affirmed.

Accordingly, the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.